



Signed and Filed: October 22, 2010

A handwritten signature in black ink, appearing to read "T. E. Carlson", is written over a horizontal line.

THOMAS E. CARLSON
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

In re) Case No. 08-30989 TEC
)
SAND HILL CAPITAL PARTNERS III, LLC,) Chapter 7
a California limited liability)
company,)
)
Debtor.)

JANINA M. ELDER, Trustee in) Adv. Proc. No. 10-3089
Bankruptcy, Sand Hill Capital)
Partners III, LLC,)
)
Plaintiff,)

vs.)

WILLIAM GREER, aka Bill Greer; and)
POWER PLAY GREER - LIVE OAK, LLC,)
)
Defendants.)

JANINA M. ELDER, Trustee in) Adv. Proc. No 10-3091 TC
Bankruptcy, Sand Hill Capital)
Partners III, LLC,)
)
Plaintiff,)

vs.)

POWER PLAY REAL ESTATE FUND, L.P.;)
POWER PLAY ESTATE MANAGEMENT, LLC;)
STEWART CAPITAL GROUP, LLC; SAND)
HILL VENTURE DEBT III, LLC; SAND)
HILL VENTURE DEBT, LLC; and CORE)
HOMES, LLC,)

Defendants.)

**MEMORANDUM DECISION RE
DEFENDANTS' RULE 12(b)(6)
MOTIONS TO DISMISS**

1 On October 8, 2010, the court held a hearing on Defendants'
2 Rule 12(b)(6) Motions to Dismiss. G. Larry Engel appeared for
3 Defendants. W. George Wailes appeared for Plaintiff. Upon due
4 consideration, and for the reasons stated below, the court
5 determines that the Motions should be granted in part and denied in
6 part.

7 I. California UFTA Claims (intentional fraudulent transfers
8 § 544; § 3439.04(a)(1); constructively fraudulent transfers,
§ 544; § 3439.04(a)(2); § 3439.05).

9 The complaints allege the transfer dates, the amounts
10 transferred, the method of transfer (e.g, wire), the name of the
11 transferee, that Debtor was insolvent at the time of the transfers,
12 and that Debtor received no value in exchange for the transfers.
13 The complaints further allege that Debtor operated a Ponzi scheme
14 from 2003 until the June 5, 2008 petition date; that the Ponzi
15 scheme attracted large sums of money that was not used to invest in
16 other entities on behalf of Debtor; and that the investors' money
17 was used for Del Biaggio's personal benefit, to pay prior
18 investors, and in furtherance of the Ponzi scheme.

19 Ponzi scheme allegations establish under the California
20 Uniform Fraudulent Transfer Act: (1) an actual intent to defraud
21 (3439.04(a)(1)), and (2) that the Ponzi scheme operator was engaged
22 or about to engage in a transaction for which the remaining assets
23 of Debtor were unreasonably small in relation to the transaction.
24 (3439.04(a)(2)). See Donnell v. Kowell, 533 F.3d 762, 770-71 (9th
25 Cir. 2009). The complaints state a claim under § 3439.05 upon
26 which relief can be granted, because they allege Debtor was
27 insolvent when transfers were made, and that no value received in
28 exchange for transfers.

1 II. Intentional and Constructively Fraudulent Transfers,
2 §§ 548(a)(1)(A), (B)

3 Pursuant to section 548(a)(1)(A), the complaints state an a
4 claim for intentional fraudulent transfer upon which relief can be
5 granted. See In re Cohen, 199 B.R. 709 (9th Cir. BAP 1996) (proof
6 of Ponzi scheme is sufficient to establish Ponzi scheme operator's
7 actual intent to hinder, delay, or defraud creditors for purposes
8 of actually fraudulent transfers under section 548(a)(1)).

9 Assuming, *arguendo*, that In re Image Masters, Inc., 421 B.R. 164
10 (Bankr. E.D. Pa. 2009) is binding precedent, it does not support
11 dismissal of the federal intentional fraudulent transfer claims,
12 because the complaint at issue in Image Masters established on its
13 face that Defendants received reasonably equivalent value in
14 exchange for the transfers and that Defendants acted in good faith.

15 The complaints state a claim for relief for constructively
16 fraudulent transfer for the reasons set forth in Donnell v. Kowell.

17 With respect to the November 12, 2005 transfer, the
18 Greer/Power Play complaint fails to state a claim for intentional
19 or constructively fraudulent transfer under section 548, because
20 the transfer occurred more than two years before the June 5, 2008
21 petition date. The section 548 claims to recover this transfer are
22 dismissed without leave to amend, because the claim is time barred
23 under section 548(a)(1).

24 III. Insider Preference Claims

25 The Greer/Power Play complaint contains only bald allegations
26 that Defendants were "insiders". These allegations are
27 insufficient to state a claim upon which relief can be granted,
28 because they are too conclusory. Ashcroft v. Iqbal, 129 S.Ct. 1937
(2009); Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007).

1 The complaint would need to allege that Defendants had a formal
2 legal relationship with Debtor (such as an affiliate) or a
3 sufficiently close relationship with Debtor that its conduct should
4 be subject to closer scrutiny than someone dealing with Debtor at
5 arms length. In re Lull, 2008 WL 3895561 (Bankr. D. Hawai'i)
6 (King, J).

7 The Power Play/Stewart Capital Group complaint alleges
8 insider preference claims only against two of the defendants: PPREM
9 and PPREF. That complaint states an adequate insider preference
10 claim as to these two defendants, because it alleges that Del
11 Biaggio at all relevant times was the managing member of Debtor and
12 controlled Debtor, and that Debtor was the managing member of
13 PPREM, which in turn was the managing member of PPREF. These
14 allegations state a claim that PPREM and PPREF were statutory
15 insiders of Debtor or had a sufficiently close relationship with
16 Debtor that their conduct should be subject to closer scrutiny than
17 someone dealing with Debtor at arms length. 11 U.S.C. § 101
18 (31)(B)(iii), (vi).

19 IV. Claims for Breach of Contract; Breach of the Implied of Good
20 Faith and Fair Dealing; and for Turnover.

21 The complaints contain wholly conclusory allegations regarding
22 Defendants' alleged breach of contract, breach of the covenant of
23 good faith and fair dealing, and turnover. Conclusory allegations
24 that merely recite the elements of a claim are insufficient to
25 state a claim upon which relief may be granted. Twombly, 127 S.Ct.
26 at 1965.

27 V. Account Stated

28 The complaints allege in conclusory fashion that, during the
four years prepetition, an account was stated in writing between

1 Debtor and Defendants and that no amount has been repaid despite
2 demand for payment. The complaints fail to state a claim for
3 account stated upon which relief can be granted, because they do
4 not allege an agreement, based on prior transactions between
5 Plaintiff and Defendant, that the items of an account were true and
6 that "the balance struck [was] due and owing." Maggio, Inc. v.
7 Neal, 196 Cal. App. 3d 745, 752-53 (Ct. App. 1987). 'To be an
8 account stated, it must appear that at the time of the statement an
9 indebtedness from one party to the other existed, that a balance
10 was then struck and agreed to be the correct sum owing from the
11 debtor to the creditor, and that the debtor expressly or impliedly
12 promised to pay the creditor the amount thus determined to be
13 owing." Id. (citation omitted).

14 VI. Accounting

15 The complaints fail to state a claim for accounting, because
16 they do not allege the existence of a fiduciary relationship
17 between Debtor and Defendants,¹ or that the transactions were so
18 complicated as to required an accounting to determine the financial
19 status of the parties with respect to each other. 5 Witkin Cal.
20 Proc. Pleading § 819, p. 236; Civic Western Corp. v. Zila
21 Industries, Inc., 66 Cal. App. 3d 1 (1977); St. James Church v.
22 Sup. Ct., 135 Cal. App. 2d 352, 359 (1955) (accounting normally
23

24 ¹ The Power Play/Stewart Capital complaint alleges that
25 Plaintiff was the managing member of PPREM, which was the
26 managing member of PPREF. The parties did not argue, and the
27 court does not at this time decide, the effect this legal
28 relationship may have on an action against these defendants
for an accounting. See Witkin, 5 Cal. Proc., Pleading
§ 821(c)(3), p. 238 (5th Ed) ("Because a partner has access
to the partnership books, he or she cannot require an
accounting from copartners except under unusual
circumstances.")

1 appropriate when plaintiff seeks to recover an amount that is
2 unliquidated and unascertained, and that cannot be determined
3 without an accounting).

4 VII. Defenses to "Non Core" Causes of Action (Unclean Hands; In
5 Pari Delicto; Laches)

6 If the complaints are amended to allege legally sufficient
7 Non-Core Claims (as defined in the Motions to Dismiss)², such claims
8 are not barred by the defenses of unclean hands or laches, because
9 prejudice or injury to Defendants is a fact issue that cannot be
10 decided in the 12(b)(6) context. Nor would the defense of *in pari*
11 *delicto* necessarily bar the trustee's Non Core Claims. It is
12 conceivable that the amended complaints would allege facts that
13 establish the "adverse interest exception" to *in pari delicto*, i.e.
14 that Del Biaggio was acting for his own interest and not that of
15 the LLC, in which case Del Biaggio's fraud would not be imputed to
16 Debtor (or the trustee, standing in the shoes of Debtor). In re
17 Crown Vantage, Inc., 2003 WL 25257821 (N.D. Cal).

18 VIII. Leave to Amend

19 Leave to amend is granted regarding all dismissed claims,
20 except the section 548 claims seeking to avoid the November 12,
21 2005 transfer. In light of the parties' settlement efforts, the
22 time for Plaintiff to file and serve the amended complaints and for
23 Defendants to file and serve responses to the amended complaints is
24 extended until entry of a separate order by this court.

25 ****END OF MEMORANDUM****

26
27 ²

28 Defendants define the Non Core causes of action as the
claims for accounting, breach of contract, breach of the
implied covenant of good faith and fair dealing, account
stated, and turnover.